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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOSE MARIO GONZALEZ, Defendant and Appellant.	B208717 (Los Angeles County Super. Ct. Nos. TA089195, TA086842)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gary E. Daigh, Judge. Affirmed.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., and Margaret E. Maxwell, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jose Mario Gonzalez of willful, premeditated, and deliberate attempted murder, assault with a firearm, being an accessory after the fact, and evading a peace officer. The convictions related to two separate shootings. Appellant contends: (1) the trial court abused its discretion in denying his two *Marsden* motions;[1] (2) insufficient evidence supported gang enhancement allegations as to four of the charged counts; (3) the trial court should have bifurcated the proceedings and tried the gang enhancement allegations separately; (4) the trial court erred in denying appellant's motions to sever; (5) the trial court committed instructional errors; and (6) the trial court erred in responding to the jury's request that certain trial testimony be reread. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

We review the evidence in accordance with the usual rules on appeal. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357 (*Zamudio*).)

July 2006 Incident (Counts 7 & 8)

On July 7, 2006, Tonik P. was sitting in front of a friend's house, with her friend's brother, L.C. A black SUV truck pulled up in front of the house. Appellant got out of the passenger side of the car and asked, "Hey, homey, where are you from?" L.C. replied, "We don't gang bang." Appellant said, "Well, this is East Side Mob," pulled out a gun, and began shooting. A bullet passed three to four inches away from Tonik's head. Tonik ran behind the building. She heard footsteps approaching her, then she heard appellant return to the truck and shut the door.

Lonny J., Tonik's brother, was inside a house across the street. Through a screen door, he saw a dark truck pull up across the street. He turned away from the door, then heard shots a few moments later. Lonny ran back to the door and saw appellant getting into the truck. Appellant was holding a metal object that looked like a gun.

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[1] *People v. Marsden* (1970) 2 Cal.3d 118.

Tonik called 911 after the shooting, but deputy sheriffs did not arrive until the next day. In September 2006, Tonik identified appellant as the shooter from a collection of 30 to 45 photographs. Appellant's family used to live across the street from Tonik, and appellant was friends with Tonik's cousins. Tonik had seen appellant before at her family's barbecues. On cross-examination, Tonik and Lonny denied any knowledge that appellant, or one of his friends, dated their sister.

At trial, appellant offered the testimony of Laura J., the grandmother of appellant's girlfriend. In the summer of 2006, appellant flew to Phoenix, Arizona, where Laura lived at the time, to help drive a two-car caravan back to Los Angeles. Laura recalled seeing appellant in Arizona in late July or early August 2006.

September 2006 Incident (Counts 1-6)

On the morning of September 29, 2006, Rodney Beverly was at a liquor store in Lynwood.[2] He heard gunfire while at the purchase counter. Another man who had just walked into the store dropped to the floor. He looked up and told Beverly, "You got hit." A bullet or bullet fragment hit Beverly in the throat near his Adam's apple. A bullet fragment was later removed from Beverly's neck.

Police Officer Marlon Williams was parked close to the liquor store when he heard four or five gunshots nearby. He drove in the direction of the shots and saw appellant and codefendant Giane Lollar sitting in a car in front of the store. The two men were looking at the store. When they turned away, the driver—appellant—saw Officer Williams and looked surprised. Appellant drove away from the liquor store. Officer Williams followed. Officer Williams then turned on his patrol car's forward red lights to attempt a traffic stop. Appellant drove across a double yellow line, southbound into northbound traffic, then turned and drove eastbound against westbound traffic. Officer Williams initiated a pursuit. Appellant did not stop at stop signs or traffic signals and drove close to 50 miles per hour in a residential neighborhood with a 25 miles per hour

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[2] Beverly was murdered shortly before the trial. His testimony from the preliminary hearing was read to the jury.

speed limit. The car pulled up to a large apartment complex and Lollar got out. He was wearing blue shorts. Officer Williams put out a description of Lollar on his radio and continued to follow appellant in the car. Eventually, appellant turned back into the apartment complex and jumped out of the car. Appellant ran through the apartment complex with Officer Williams in pursuit, then gave up when his path was blocked by another police officer.

Meanwhile, other officers searched for Lollar. A resident in the apartment complex told deputy sheriffs she saw a man in blue shorts digging in the ground and burying something. She showed a deputy the spot where the item was buried. The deputy kicked away dirt and discovered a gun in a sock. Deputy sheriffs searching the area found Lollar. He was still wearing blue shorts and had streaks of mud or dirt on his arms and hands. Although Lollar was walking, he was out of breath and sweating. A criminalist examined the bullet fragment removed from Beverly's neck and the gun that was buried at the apartment complex. At trial, he opined that the bullet fragment came from the gun that had been buried.

Gang Evidence

Detective Gina Cabrera testified as a gang expert at trial. Based on police reports written by other officers, as well as appellant and Lollar's tattoos, Detective Cabrera opined that appellant was a member of the East Side Mob Piru gang (Mob Piru), and Lollar a member of the Lueders Park Piru gang. Appellant used the moniker "Ghetto Boy," and Lollar the moniker "Rambo." According to Detective Cabrera, the Mob Piru and Lueders Park Piru gangs are allies, and it is common for their members to commit crimes together. Detective Cabrera identified Mob Piru's primary activities as narcotics related crimes, assaults with deadly weapons, murders, and robberies. She stated Lueders Park Piru engaged in similar activities. The People introduced evidence of convictions of two Lueders Park Piru gang members for attempted robbery and possession of a firearm while being a felon, and convictions of two Mob Piru gang members for possession of cocaine base for sale and possession of a firearm while being a felon.

Detective Cabrera was presented with hypotheticals outlining the facts of each incident as established at trial. Based on the hypothetical mirroring the facts of the July 2006 incident, Detective Cabrera opined the shooting was committed for the benefit of the Mob Piru gang. Appellant's act of yelling out "East Side Mob Piru" let victims know they were in the gang's territory, and that the gang was responsible for the crime. The street on which the shooting occurred was within Mob Piru territory.

Similarly, Detective Cabrera opined the September 2006 shooting was committed to benefit a gang. She explained:

> "I believe [the shooting was committed to benefit a gang] for the mere fact that the crime that was committed was a violent crime. It was used with a gun so the tendency for murder is very high. The mere fact that the individuals drove around their gang territory kind of in a manner of, 'Hey, other fellow people, look at me. Other gang members look at me. We are kind of driving around kind of in a way to avoid capture' gives them a little bit of notoriety. The mere fact that they ran into an apartment complex that is known to house or where a lot of -- a hangout for gang members of the Mob Piru gang. [¶] . . . [¶] The fact being that there are other gang members in that area from different gangs it basically lets them know that these individuals, this gang is not afraid of committing a crime so violent as attempted murder in midday right in front of other gang members."

Verdict and Sentence

With respect to the September 2006 shooting, the jury found appellant guilty of: two counts of attempted willful, deliberate, premeditated murder (Pen. Code, §§ 187, subd. (a), 664; counts 1 & 2);[3] two counts of assault with a firearm (§ 245, subd. (a)(2); counts 3 & 4); one count of accessory after the fact (§ 32; count 5); and one count of evading an officer with willful disregard for the safety of persons and property (Veh. Code, § 2800.2, subd. (a); count 6). With respect to the July 2006 shooting, the jury found appellant guilty of: assault with a firearm (§ 245, subd. (a)(2); count 7); and one count of attempted willful, deliberate, premeditated murder (§§ 187, subd. (a), 664; count 8).

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3 All further statutory references are to the Penal Code, unless otherwise noted.

The jury also found true the following special allegations: personal and intentional discharge of a firearm by a principal (§ 12022.53, subds. (c), (e)(1)), and personal use of a firearm by a principal (*Id.*, subds. (b), (e)(1)), as to counts 1 and 2; gang enhancements as to counts 1, 2, 3, 4, 7, and 8 (§ 186.22, subd. (b)(1)(C)); personal and intentional discharge of a firearm by a principal causing great bodily injury as to count 2 (§ 12022.53, subds. (d), (e)(1)); and personal use of a firearm as to counts 7 and 8 (§§ 1203.6, subd. (a)(1), 12022.5, subd. (a)).[4]

The trial court dismissed count 5 (accessory after the fact). Appellant was sentenced to an aggregate term of 112 years to life.

DISCUSSION

I. The Trial Court Properly Denied Appellant's *Marsden* Motions

A. Background

Appellant filed two *Marsden* motions, one before trial began, and one after. When explaining the basis for the first motion, appellant stated that his attorney had "called [appellant] out of [his] name," and that the attorney thought appellant was an active gang member. Appellant contended: "[Counsel] got it set in his mind that I'm just another gang member, and I'm guilty in my case. He don't look for no defense in trial. I don't know what my defense is. I don't know what's going on." Counsel told the court he did not recall having any arguments with appellant, and that he did not remember addressing whether appellant was an active or inactive gang member. Counsel also informed the court that he had recently provided appellant with the discovery he wanted. The trial court asked appellant several questions to clarify his arguments, then denied the motion.

After trial, appellant filed a second motion.[5] Appellant claimed his counsel did not call witnesses he believed should have been called, they did not file the "right"

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[4] Lollar was also found guilty on all counts and special allegations charged against him (counts 1-4).

[5] At trial, appellant had two attorneys, one for each incident charged. The second *Marsden* motion concerned both attorneys.

motion for severance, counsel's investigator should have secured a copy of appellant's plane ticket to Arizona, and gunshot residue evidence should have been offered at trial. Appellant also contended counsel's closing argument "wasn't enough. It wasn't what I was expecting, what I was promised." Counsel explained why the evidence appellant identified was not introduced, and the basis for the tactical decisions he made. The trial court denied the motion.

B. Discussion

Appellant contends the trial court erred in denying the motions because his relationship with his counsel was so strained it precluded effective assistance of counsel. We find no abuse of discretion. (*People v. Abilez* (2007) 41 Cal.4th 472, 485.)

Our high court recently explained and applied the principles applicable here: "The fact that defendant did not trust his attorney did not establish a conflict that required that appointed counsel be removed. ' "[I]f a defendant's claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment and by a process of elimination could obtain appointment of their preferred attorneys, which is certainly not the law." ' [Citations.] [¶] . . . 'Tactical disagreements between the defendant and his attorney do not by themselves constitute an "irreconcilable conflict." ' " (*People v. Jackson* (2009) 45 Cal.4th 662, 688.)

The trial court could reasonably determine there was no "irreconcilable conflict" that rendered counsel unable to provide effective representation to appellant. When explaining the basis for his first *Marsden* motion, appellant essentially stated he and his counsel were not getting along; he felt his attorney believed he was a gang member; and he was not apprised of what was going on in the case. The trial court asked several questions about these statements, and elicited counsel's response, which failed to confirm that he had any conflicts or disagreements with appellant. Appellant's explanation of the problems with his attorneys did not identify an irreconcilable conflict, and largely concerned appellant's dissatisfaction with counsel's tactical decisions. Appellant's second motion concerned only tactical disagreements. Counsel's offer to withdraw does

not mandate a contrary conclusion. The trial court did not abuse its discretion in denying appellant's *Marsden* motions.

II. Substantial Evidence Supported the Jury's Finding on the Gang Enhancements on Counts 1-4[6]

We review a jury's findings on gang enhancements for substantial evidence. We view the evidence in the light most favorable to the judgment and do not resolve evidentiary conflicts or credibility issues. We will not reverse the jury's findings unless " ' "upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict. [Citation.]" (*Zamudio*, *supra*, 43 Cal.4th at p. 357; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 321-322 (*Villalobos*).)

Under section 186.22, subdivision (b)(1), a person convicted of a felony committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members," is properly subject to its additional punishment. (*People v. Margarejo* (2008) 162 Cal.App.4th 102, 106, 108.)

Substantial evidence supported the gang enhancements. There was evidence that appellant was a gang member, as was Lollar. This alone is sufficient to show the second prong. Indeed, case law provides that committing a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent required under section 186.22. (*Villalobos*, *supra*, 145 Cal.App.4th at p. 322.) Although appellant and Lollar were not members of the same gang, the gang expert testified that their respective gangs were allies and it was common for members of the two gangs to commit crimes together.

There was additional substantial evidence. The September 2006 shooting occurred in an area that members of different gangs frequent. The gang expert testified that a shooting in the middle of the day in this area would benefit appellant's gang by

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6 Appellant does not challenge the jury's true findings on gang enhancements applicable to counts 7 and 8.

demonstrating a certain brazenness and by intimidating the neighborhood. Further, before he was caught, appellant drove around an apartment complex where members of his gang often gathered. The gang expert opined appellant's actions in evading a police officer in the middle of the day, in the midst of his gang's territory, would garner notoriety for the gang and for defendant within the gang. The expert also indicated murders were a common activity of appellant's gang.

It is true, as appellant states, that expert testimony alone may not be sufficient to support a true finding on a gang enhancement. (See *People v. Ferraez* (2003) 112 Cal.App.4th 925, 931.) But here, circumstantial evidence in addition to the expert's testimony allowed the jury to find that appellant's involvement in the September 2006 shooting was to benefit his gang, or was in association with a criminal street gang. This was not a case in which the only evidence offered to prove the gang enhancement was that a gang member committed a crime. Instead, the nature of the crime, the manner in which it was conducted, and the location were all indicia that the shooting was gang-related.

Finally, the expert did not state appellant's specific intent, and the hypothetical presented to her was grounded in the facts of the case as established at trial. (Cf. *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199.) This case is thus unlike *People v. Ramon* (2009) 175 Cal.App.4th 843, in which the expert testified that the defendant's auto theft and possession of a weapon were intended to benefit a gang because the auto and weapon could possibly be used to commit *future* gang-related crimes. Here, the expert offered testimony--bolstered by other evidence--indicating appellant committed the *charged* crimes for the benefit of a gang.

Substantial evidence supported the jury's true findings on the gang enhancements as to counts 1 through 4.

III. The Trial Court Did Not Err in Denying Appellant's Motion to Bifurcate the Gang Allegations

Before trial, appellant moved the court for separate juries. The court interpreted the motion as a request to bifurcate the gang allegations and denied the motion. We find no error.

We review the court's ruling on a motion for bifurcation of gang allegations for an abuse of discretion. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048 (*Hernandez*).) In *Hernandez*, our Supreme Court explained that while some gang evidence is extremely prejudicial and of little relevance to guilt, "evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary. [Citation.]" (*Id.* at pp. 1049-1050.)

In this case, evidence of gang membership was relevant to and admissible regarding the charged offenses. In the July 2006 shooting, evidence of appellant's gang membership was relevant to motive, identity, and specific intent. The evidence included that the shooter identified his gang right before shooting, so as to make clear that the gang was taking credit for the crime. Evidence that appellant was a member of the gang called out by the shooter was relevant to identity, and also relevant to motive and intent in a shooting between two apparent strangers. Similarly, evidence of appellant's gang membership was relevant to the September 2006 shooting on the issues of motive and specific intent.

In addition, the gang evidence introduced in this case was not highly inflammatory. The evidence of the predicate crimes connected the two gangs to possession of a firearm by a felon, attempted robbery, and a drug crime, none of which

were crimes charged in this case. Nor did the People introduce any particularly inflammatory gang evidence specifically related to appellant or Lollar. As in *Hernandez*, "[a]ny evidence admitted solely to prove the gang enhancement was not so minimally probative on the charged offense, and so inflammatory in comparison, that it threatened to sway the jury to convict regardless of [appellant's] actual guilt. Accordingly, [appellant] did not meet [his] burden 'to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.' [Citation.]" (*Hernandez*, 33 Cal.4th at p. 1051.)

People v. Albarran (2007) 149 Cal.App.4th 214 (*Albarran*), which appellant cites to support his bifurcation argument, differs from this case in several significant respects. In *Albarran*, the defendant was alleged to be a member of the 13 Kings street gang, which the prosecutor described as a "dangerous street gang;" the prosecutor also described one of the defendant's gang tattoos as a reference to the Mexican Mafia, "which is a violent prison street gang that controls the Hispanic street gangs." (*Id.* at p. 220.) The gang expert testified broadly about the gang's activities, including descriptions of graffiti attributed to the gang which contained a threat to murder police officers. (*Ibid.*) He also testified that at the time of the charged crime, the 13 Kings were involved in a gang war, although he did not know if a relevant gang rivalry led to the crime at issue. (*Id.* at p. 221.) The expert explained that gang members gained respect by committing crimes and intimidating people, including by announcing gang membership verbally, tagging, or by throwing gang signs. However, the expert admitted the defendant had not announced his gang membership or displayed gang signs during the commission of the crime, and no gang-related graffiti was involved. (*Ibid.*)

There, the court found there was insufficient evidence to prove the gang enhancements. The court further determined the gang evidence introduced at trial may have been "tangentially relevant to the gang allegations, but had no bearing on the underlying charges." (*Albarran*, *supra*, 149 Cal.App.4th at p. 227.) It concluded that lengthy testimony about the acts of other gang members, a graffiti threat to the police, and references to the Mexican Mafia were irrelevant and "obviously prejudicial." (*Id.* at

p. 228.) While evidence of the defendant's gang involvement was sufficient to prove gang motive, the other evidence "had little or no bearing on any other material issue relating to [the defendant's] guilt and approached being classified as overkill." (*Ibid.*) The gang expert's testimony required almost an entire trial day. (*Id.* at p. 227, fn. 10.)

In contrast, here the gang evidence was far more limited. The People briefly introduced evidence of four predicate crimes, in minimal detail. The gang expert described the gangs' activities, but in nongraphic detail. Moreover, as discussed above, we find there was sufficient evidence to support a true finding on the gang enhancements with respect to both incidents. In addition, we have concluded the gang evidence was relevant to the underlying crimes. The trial court did not abuse its discretion in denying appellant's motion to bifurcate the gang allegations.

IV. The Trial Court Did Not Err in Denying Appellant's Motion to Sever the Counts or the Defendants at Trial

Appellant filed two motions to sever. In October 2007, appellant requested that he be tried separately from Lollar because of the possibility that Lollar might offer exculpatory testimony at appellant's trial if he were tried first. Appellant's counsel filed a declaration with the court indicating that "Lollar has stated in the police reports and the preliminary hearing transcript reveals that [appellant] '. . . had no prior knowledge of [Lollar's] intention to seek out this person and shoot him. [Lollar] stated that [appellant] was not involved in this shooting . . . .' " The court concluded there was no basis to believe Lollar would testify on appellant's behalf or incriminate himself, and denied the motion.

In January 2008, appellant moved for separate juries, one for counts 1 through 6, and one for counts 7 and 8. The court denied the motion. Appellant contends the trial court abused its discretion in denying the requests for severance, thereby violating his rights to due process, a fair trial, a jury trial, and fundamental fairness under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, as well as their California counterparts. We disagree.

A. Severance of Defendants to Allow for Potential Exculpatory Testimony

"Two defendants jointly charged with the same offense must be tried together, except when the trial court in its discretion orders separate trials. (§ 1098; *People v. Massie* (1967) 66 Cal.2d 899, 916 [(*Massie*)].)" (*People v. Jackson* (1996) 13 Cal.4th 1164, 1207 (*Jackson*).) " '[T]he possibility that at a separate trial a codefendant would give exonerating testimony' weighs in favor of severance. [Citation.]" (*Jackson*, at p. 1208.)

"[T]here are two levels of review when a defendant alleges prejudicial error in the denial of a motion to sever. The first level of review determines whether the trial court abused its discretion in denying the motion. If it is concluded that there was no abuse of discretion, the next level of review determines whether the failure to sever resulted in gross unfairness which denied the defendant a fair trial or due process. The first level of review focuses on what was presented to the trial court at the time it made its decision. The second level of review focuses on what actually happened in the joint trial." (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 343.)

Although the potential that one defendant may be able to exculpate another if they are granted separate trials weighs in favor of severance, there must be some basis for the trial court to determine that such testimony is possible. (*Jackson*, *supra*, 13 Cal.4th at p. 1208.) Thus, in the cases appellant cites to support his argument such as *Massie* and *United States v. Echeles* (7th Cir. 1965) 352 F.2d 892 (*Echeles*), a codefendant made statements exonerating the defendant before judicial officers. In *Massie*, the codefendant stated in open court that the defendant had nothing to do with the crime. (*Massie*, *supra*, 66 Cal.2d at p. 915, fn. 11.) In *Echeles*, the codefendant made three statements in a prior trial exonerating the defendant, and indicated that he wanted to testify on behalf of the defendant if the two were tried separately. (*Echeles*, at pp. 897-898.)

The information available to the trial court here was more speculative. At a preliminary hearing, a detective testified that Lollar told her appellant had no prior knowledge of Lollar's intent to seek out and shoot someone. The only other indication of Lollar's potentially exculpatory testimony came from appellant's representation of

statements contained in police reports that were never made part of the record or presented to the court. Further, Lollar's counsel was present during the motion for severance, and he did not suggest or confirm that Lollar would be willing to testify on appellant's behalf should the two be tried separately.

As explained in *People v. Isenor* (1971) 17 Cal.App.3d 324, "[t]he mere assertion that a codefendant might be willing to exculpate a defendant is purely speculative. The absence of substantial proof that a codefendant would be willing to testify for the defendant at a later date is, in itself, grounds for denying a motion for severance. [Citations.]" (*Id.* at pp. 333-334; see also *People v. Conerly* (2009) 176 Cal.App.4th 240, 251 (*Conerly*) [no abuse of discretion where codefendant's proposed testimony was uncorroborated and offer to testify was conditioned upon his case being tried first; distinguishing *Echeles*].)

There was no substantial proof that Lollar was willing to testify for appellant if their trials were severed. Although Lollar told police that appellant did not know that Lollar intended to shoot at the liquor store, these statements were not repeated to a judicial officer, nor was there ever any indication that Lollar was willing to repeat such statements in court. (*Conerly*, *supra*, 176 Cal.App.4th at p. 252.) The trial court did not abuse its discretion in denying appellant's motion for severance of the defendants.

B. Severance of Counts

Under section 954, an accusatory pleading may charge two or more different offenses of the same class of crimes or offenses under separate counts. The trial court, "in the interests of justice and for good cause shown, may in its discretion order that different offenses . . . be tried separately." (§ 954.) However, the strong preference is for joinder of charged offenses. (*People v. Soper* (2009) 45 Cal.4th 759, 772, 782 (*Soper*).)

"We review a trial court's decision not to sever for abuse of discretion based on the record when the motion is heard. [Citations.] A pretrial ruling denying severance that is not an abuse of discretion can be reversed on appeal only if joinder is so grossly unfair as to deny the defendant due process. [Citation.] [¶] Factors to be considered in assessing the propriety of joinder include: '(1) the cross-admissibility of the evidence in

separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case.' [Citation.] When, as here, crimes of the same class are charged together, 'evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together. . . .' (§ 954.1.)" (*People v. Cook* (2006) 39 Cal.4th 566, 581, citing *People v. Mendoza* (2000) 24 Cal.4th 130, 161 (*Mendoza*); *Soper*, *supra*, 45 Cal.4th at p. 775; *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220 (*Alcala*) [accord].)

Appellant concedes the two charged incidents were of the same class of crimes, and that the threshold for joinder was met. However, he argues there was no cross-admissibility of evidence between the two incidents, and since the two crimes were committed months apart; had different accomplices and witnesses; and, according to appellant, one incident appeared to be gang-related and the other did not, appellant did not receive a fair trial. His arguments are unavailing.

The absence of cross-admissibility of evidence does not, by itself, demonstrate prejudice when severance is not ordered. (*Soper*, *supra*, 45 Cal.4th at pp. 779-780; *Alcala*, *supra*, 43 Cal.4th at p. 1221.) Thus, we consider the other factors mentioned above. None of the charges here was likely to inflame the jury against appellant. In both incidents, appellant was alleged to have been involved in a shooting and attempted murder. In the July 2006 incident, no one was injured. In the September 2006 incident, a victim suffered injuries that were apparently painful, but not life threatening. Both attempted murders were equally serious, with similar outcomes. Thus, the trial court could reasonably conclude that neither incident alone was likely to inflame the jury against appellant, rendering the jurors unable to separately consider the evidence of the other incident. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1245 [evidence of separate charges was equally inflammatory].)

The trial court also could reasonably conclude there was little likelihood of "spillover" from linking a weak case with a stronger one. (*Soper*, *supra*, 45 Cal.4th at p. 781.) In the September 2006 incident, a police officer saw appellant and Lollar near the scene of the shooting immediately after shots were fired, appellant was driving the car and fled, and there was significant evidence that Lollar jumped out of the car and buried the gun that matched the bullet fragments extracted from Beverly's neck. In the July 2006 incident, there were two eyewitness accounts of what happened and both witnesses identified appellant as the shooter. Appellant was unable to establish an alibi or witness bias.

Any difference in the strength of the evidence of the two crimes was minimal. "Furthermore, the benefits of joinder are not outweighed—and severance is not required—merely because properly joined charges might make it more difficult for a defendant to avoid conviction compared with his or her chances were the charges to be separately tried." (*Soper*, *supra*, 45 Cal.4th at p. 781.) As to the fourth factor, the joinder of charges did not result in a capital offense.

To establish error in the trial court's ruling denying his motion to sever the charges, appellant was required to make a " ' "clear showing of prejudice to establish that the trial court abused its discretion . . . ." ' [Citation.] A trial court's denial of a motion to sever properly joined charged offenses amounts to a prejudicial abuse of discretion only if that ruling ' " ' " 'falls outside the bounds of reason.' " ' " ' [Citation.]" (*Soper*, *supra*, 45 Cal.4th at p. 774.) Appellant did not meet this burden here.

Last, the trial court's denial of severance did not result in actual unfairness so great that it denied appellant due process or deprived him of his right to a fair trial. (*Soper*, *supra*, 45 Cal.4th at p. 783; *Cook*, *supra*, 39 Cal.4th at p. 583.) As in *Mendoza*, "the consolidated offenses were factually separable. Thus, there was a minimal risk of confusing the jury or of having the jury consider the commission of one of the joined crimes as evidence of defendant's commission of another of the joined crimes." (*Mendoza*, *supra*, 24 Cal.4th at p. 163; *Soper*, at p. 784.) The prosecution did not suggest that evidence from one incident could be used to prove or strengthen the other incident.

(Cf. *People v. Grant* (2003) 113 Cal.App.4th 579, 589-590.) The joint trial of all of the charges did not result in a grossly unfair trial.

V. Jury Instructions

A. The Trial Court Did Not Err in Instructing the Jury with CALCRIM Instruction on Reasonable Doubt[7]

The trial court instructed the jury with the current version of CALCRIM No. 220, which provides in relevant part:

> "A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise."

Appellant contends that since this version of the instruction does not specifically state the People must prove each element of every crime beyond a reasonable doubt, the instruction failed under California law. We disagree, as have at least two other courts of appeal.

In *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088 (*Ramos*), the Court of Appeal considered and rejected the argument appellant advances in this case:

> " ' "In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." [Citation.]' [Citation.] " 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.] [¶] Construed in light of these principles, and in the context of the instructions as a whole, CALCRIM No. 220 adequately explains the applicable law. The instruction explicitly informed the jurors that '*Whenever* I tell you the People must prove something, I mean they must prove it beyond a

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[7] Appellant identifies the reasonable doubt instruction as CALCRIM No. 103, which is a pretrial instruction within the pattern instructions, while CALCRIM No. 220 is identified as a posttrial instruction. While CALCRIM Nos. 103 and 220 are identical in text, the trial court instructed the jury with CALCRIM No. 220. We will refer to CALCRIM No. 220 in our discussion.

> reasonable doubt.' (Italics added.) In this case, the trial judge went on to enumerate each of the elements of the charged crime and the special allegation, and stated that the People were obligated to prove each of those elements in order for the defendant to be found guilty. If we assume, as we must, that ' "the jurors [were] intelligent persons and capable of understanding *and correlating* all jury instructions . . . given . . . ." [citation]' [citation], then we can only conclude that the instructions, taken as a whole, adequately informed the jury that the prosecution was required to prove each element of the charged crime beyond a reasonable doubt." (*Ramos*, *supra*, 163 Cal.App.4th at p. 1088, fn. omitted.)

The appellate court in *People v. Wyatt* (2008) 165 Cal.App.4th 1592, came to the same conclusion based on similar reasoning. (See also *People v. Henning* (2009) 178 Cal.App.4th 388, 405-406 [refusing to consider *Wyatt* and deeming argument frivolous] .) We agree with the *Ramos* and *Wyatt* courts. Here, the trial court not only instructed the jury with CALCRIM No. 220, but also gave several instructions explaining the elements of specific crimes the People were required to prove. We assume the jury understood that the admonition from CALCRIM No. 220—when the trial court instructed the People had to prove something, that meant proof beyond a reasonable doubt—applied to the instructions that followed.[8]

B. The Trial Court Did Not Err in Instructing the Jury on the Intent Required for Attempted Murder

Appellant argues the trial court erred by failing to instruct the jury on express malice, in addition to the specific intent to kill, in the attempted murder instruction. We disagree.

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[8] We also note that before the jury was selected, the trial court gave the entire jury pool several general instructions. In those instructions, the trial court told the potential jurors the People's burden was to "prove each element of each crime regardless of who it's against beyond a reasonable doubt," and moments later repeated that "the burden is on the People to prove each element of each charge beyond a reasonable doubt. Each crime has different elements and the People have to prove each one by that burden."

On attempted murder, the trial court instructed the jury with CALCRIM No. 600, which states in relevant part: "To prove that the defendant is guilty of attempted murder, the People must prove: [¶] 1. The defendant took at least one direct but ineffective step toward killing another person; [¶] and [¶] 2. The defendant intended to kill that person." This language was sufficient to instruct the jury on the specific intent required for it to find appellant guilty of attempted murder. Our Supreme Court has held that "[i]ntent to kill and express malice are, in essence, 'one and the same.' [Citation.]" (*People v. Smith* (2005) 37 Cal.4th 733, 739.) The instruction did not need to specifically mention express malice, since it expressly stated the People had to prove the defendant intended to kill the victim. Although appellant contends the jury could have construed "intended" to mean "willfully," we have no reason to believe this was the case, and further we must assume the jury followed the instructions given.

People v. Patterson (1989) 209 Cal.App.3d 610, upon which appellant relies, is inapposite. In *Patterson*, the court instructed the jury that attempted murder requires proof of a specific intent to commit murder. However, when instructing on murder, the trial court gave an instruction that allowed the jury to apply theories of murder that do not require express malice, such as implied malice or felony murder. (*Id.* at p. 613.) Here, the trial court specifically instructed the jury that attempted murder required proof that the appellant intended to kill the victim. *Patterson* does not stand for the proposition that the jury must be instructed on express malice *and* specific intent to kill on an attempted murder charge. We find no error.

VI. The Failure to Provide a Second Readback of Testimony Was Not Reversible Error

A. Background

During jury deliberations, the jury asked for readback of Tonik's testimony regarding her identification of appellant. The testimony was read to the jury. The following day, the jury requested another reading of the exact same portion of Tonik's testimony. However, the court reporter was at the hospital and could not reread the testimony at that time. The trial court responded to the jury's request with a note that

stated: "Our court reporter, Donna, is at the hospital with her ill father. I don't know when she will return to work." Neither side objected to the trial court's response. Later that afternoon, the jury returned its verdict.

B. Discussion

Appellant contends the trial court's failure to provide a second reading of the testimony was reversible error; we disagree.

First, the People argue appellant waived this issue by failing to object to the trial court's response to the jury's request. Some courts have held a violation of section 1138 may be waived by the defendant's failure to object or acquiescence (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193), while others have concluded the defendant cannot waive the *jury*'s right to have testimony readback (*People v. Litteral* (1978) 79 Cal.App.3d 790, 796-797 (*Litteral*)). (See *People v. Frye* (1998) 18 Cal.4th 894 (*Frye*), disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [Supreme Court noted the different opinions on forfeiture, but declined to resolve the issue].) Appellant argues the issue was not forfeited, and, even if forfeited, the issue is before this court in the context of ineffective assistance of counsel. Without deciding this issue, we reject the contention on the merits.

Under section 1138, " 'the trial court must satisfy requests by the jury for the rereading of testimony.' [Citation.]" (*People v. Box* (2000) 23 Cal.4th 1153, 1213 (*Box*), disapproved on another point in *People v. Martinez* (Jan. 14, 2010, S074624) __ Cal.4th __ [10 C.D.O.S. 583].) Thus, courts have found trial court error when the court completely refuses to provide requested readback. (*Litteral*, *supra*, 79 Cal.App.3d 790; *People v. Butler* (1975) 47 Cal.App.3d 273 (*Butler*).) However, when rereading testimony is logistically impossible, the trial court may inform the jury of the situation and give the jurors the options of recessing or continuing deliberations until readback may be provided. For example, in *People v. Gonzalez* (1968) 68 Cal.2d 467 (*Gonzalez*), the trial court told the jury a reading could not provided until the next day, and offered that the jury could either continue deliberations or recess until the requested testimony

could be read to them. The jury continued deliberating and returned a verdict before the end of the day. Our high court found no error. (*Gonzalez*, at pp. 472-473.)

Here, it is important to note that the trial court did not deny the jury's request for rereading of testimony. In fact, the trial court *provided* a rereading of the requested testimony. When faced with the request for a *second reading* of the *same testimony*, the trial court truthfully explained the situation to the jurors, without either stating that the testimony would not be read or explicitly directing the jurors to complete deliberations without the benefit of hearing the requested Tonik testimony a second time. The trial court did not advise the jury it would not provide readback of the requested testimony, as was the case in *Litteral* and *Butler*. The facts more closely resemble those presented in *Gonzalez*, except that the trial court did not explicitly inform the jury of the alternatives available to it.

However, even if the trial court's approach was error, reversal is not required unless there was prejudice. (*Litteral*, *supra*, 79 Cal.App.3d at p. 797.) In this case, the jury was not deprived of readback. Instead, the jury heard the requested testimony once on the day before the second request. In addition, although the jury may have had questions about some aspect of Tonik's identification of appellant, there was another eyewitness identification introduced at trial. Lonny, Tonik's brother, also identified appellant from the scene of the shooting as the man getting back into the SUV with a gun in his hand. It is not reasonably probable the outcome would have been different had the Tonik testimony been readback a second time. (*Box*, *supra*, 23 Cal.4th at p. 1214.) We conclude any error in the trial court's refusal to provide the second requested readback, or its failure to explain the possible alternatives to the jury, was not prejudicial error. (*Frye*, *supra*, 18 Cal.4th at p. 1008.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BIGELOW, J.

We concur:

RUBIN, Acting P. J.

FLIER, J.